contracting parties, fixing no time for performance contemplate a continuation of normal conditions of labor and a normal supply of material. They contemplate no change in the then existing circumstances that are to come into play in the carrying out of the contract; and according to their expectations due performance will be on this basis.[15] If that is so, each party should assume the risks attendant on his obligations just as in contracts with a definite time stipulation, and in the absence of express provision to the contrary[16] the practice of normal industrial activity should determine by whom these risks are to be borne.

RECEIVING THE PROCEEDS OF STOLEN GOODS AS A CRIMINAL OFFENSE.—"The crime of receiving stolen goods includes generally the receiving, buying, concealing, or aiding in concealing goods stolen or embezzled with knowledge that they were so stolen or embezzled, and with fraudulent intent to deprive the true owner thereof."[1] In early common law this offense was but a mere misdemeanor,[2] and only included the receipt of goods which had been secured by common law larceny. Later the crime was elevated to a felony by the Statute of 3 William and Mary, c. 9, § 4, which made the receiver an accessory after the fact.[3] But since an accessory could not be convicted before the conviction of the principal felon[4] it was impossible to prosecute the receiver whenever the principal could not be found, or was not amenable to justice. To overcome this difficulty the supplementary statutes of 1 Anne, c. 9, § 2, and 5 Anne, c. 31, §§ 5, 6, were passed providing "that where the principal felon could not be taken, the receiver might be separately prosecuted as for a misdemeanor."[5] Later the Statute of 7 and 8 George IV, c. 29, § 54, made the offense of

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[15] *Supra,* footnote 13.

[16] In the following cases there was such an expressed stipulation: Matsoukis *v.* Priestman & Co. [1915] 1 K. B. 681; Delaware L. & W. Ry. *v.* Bowns (1874) 58 N. Y. 573; Weber *v.* Collins (1897) 139 Mo. 501, 41 S. W. 249; Wood *v.* Keyser (D. C. 1897) 84 Fed. 688. In Koski *v.* Finder, *supra,* footnote 2, the court at p. 291 dismisses the excuse for delay in performance because of the strike on the ground that "the contract does not make a strike an excuse for delay."

[1] 34 Cyc. 514.

[2] 2 Bishop, New Criminal Law (8th ed.) § 1137; 2 Russell, Law of Crimes (7th Eng. ed.) 1465; Kenny, Outline of Criminal Law 252. "To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law a mere *misdemeanor,* and made not the receiver accessory to the theft; because he received the *goods* only and not the felon." 4 Blackstone, Comm. (Lewis ed.) *38.

[3] Thomas Butler & Thomas Quin *v.* The State (S. C. 1825) 3 McCord *383; see State *v.* Hodges (1880) 55 Md. 127.

[4] 18 Columbia Law Rev. 471; see The State of Connecticut *v.* Weston (1833) 9 Conn. 527; "And unless the principal felon was convicted, the receiver as an accessory after the fact could not be convicted. If then the principal felon escaped or was kept out of the way, the receiver went unpunished." State *v.* Hodges, *supra,* footnote 3, at p. 135.

[5] See State *v.* Hodges, *supra,* footnote 3; 1 Bishop, *op. cit.* 699.

receiving stolen goods a separate crime, and the receiver subject to prosecution irrespective of the conviction of the thief or his amenability to justice.[6] Since these statutes, however, were passed subsequent to the settlement of the colonies, they were not regarded as common law in most of the original states.[7] But with the progressive tendency to regard the receipt of stolen property as morally culpable as the stealing itself, most legislatures enacted laws making the offense a separate and distinct felony, although there are still a few states which regard the crime a misdemeanor.[8] In addition to that some statutes go much further than the common law by including within this offense goods that have been embezzled or obtained by false pretences as well as property which has been secured by larceny.[9] All this legislation shows a distinct progressive tendency to reach out and punish the receiver of stolen goods.

One of the necessary elements of the crime of receiving stolen property is that the goods which came into the possession of the accused, be stolen goods at the time they are received.[10] Furthermore, in spite of the limited number of cases on the question, there is little doubt that at common law in order to convict one of this crime, it was absolutely necessary to prove that the accused received the *identical* property which had been stolen.[11] Of course, "if the thing received retained its character but was merely converted into a different form it would still be the identical chattel within the meaning of the law." Thus where the thief stole a live sheep which he killed and gave to the defendant, a conviction was properly sustained.[12] Or "if the stolen (gold) dust was made into coin this circumstance would not change its identity, and the possession of such coin would be the

[6] 34 Cyc. 515.

[7] 1 Bishop, *op. cit.* § 700.

[8] The State of Connecticut *v.* Weston, *supra,* footnote 4; Swaggerty *v.* The State (1836) 17 Tenn. 338; Commonwealth *v.* Barry (1874) 116 Mass. 1; Allison *v.* Commonwealth (1885) 83 Ky. 254; Anderson & Brown *v.* The State of Florida (1896) 38 Fla. 3, 20 So. 765; see Engster *v.* The State (1881) 11 Neb. 539, 10 N. W. 453; Watts *v.* The People (1903) 204 Ill. 233, 68 N. E. 563; State *v.* Johnson (1917) 90 N. J. L. 21, 100 Atl. 242.

[9] Clark, Criminal Law 380; N. Y. Penal Law § 1308.

[10] People *v.* Jaffe (1906) 185 N. Y. 497, 78 N. E. 169; Clark, *op. cit.,* 378.

[11] "It is conceived that no indictment could be framed for receiving the proceeds of stolen property. The section only applies to receiving *the* chattel stolen, knowing *that* chattel to have been stolen. In the case of gold, silver, *etc.,* if it were melted after the stealing an indictment for receiving it might be suported, because it would still be the *same* chattel though altered by the melting, but where a £100 note is changed for other notes, the identical chattel is gone, and a person might as well be indicted for receiving the money for which a stolen horse was sold, as for receiving the proceeds of a stolen note." 2 Russell, *op cit.,* 1479, footnote q; People *v.* Ammon (1904) 92 App. Div. 205, 87 N. Y. Supp. 358; see United States *v.* Montgomery (U. S. Dist. Ct. 1875) 3 Sawyer 544.

[12] Rex *v.* Cowell (1796) 2 East. P. C. 617; see quotation in footnote 11.

possession of the stolen property."[13] The question, of the identity of goods, arose in the case of *People ex rel. Briggs* v. *Hanley* (N. Y. App. Div. 1st Dept. 1918) 173 N. Y. Supp. 693. One Foye procured three loans from Brown of Philadelphia by means of forged collateral. No checks or drafts passed between Brown and Foye, but the moneys were wired to New York, and were transmitted by various cashiers' checks through several banks to the credit of Foye in the Columbia Knickerbocker Trust Company. Foye had no funds in the bank except the proceeds of these loans. Thereafter Foye drew $25,000 out of this account in the Columbia Knickerbocker Trust Company, and gave $21,000 of these *identical* bills to the relator, who had full knowledge of the entire transaction. The relator was arrested for receiving stolen property and on a *habeas corpus,* the court held, one judge dissenting, that the money received from Foye by the relator was not the identical property which Foye had originally stolen; and that, therefore, she could not be convicted of the crime of receiving stolen goods.

Under common law the decision is sound. The next question is whether the result is the same under the New York Statute. § 1308 of the Penal Law provides that the receiver shall be guilty if he buys or receives with guilty knowledge "any stolen property, or any property which has been wrongfully appropriated in such a manner as to constitute larceny according to this article." Hence, whether or not the relator is guilty of the crime depends upon whether Foye committed larceny under the Statute when he gave her the $21,000. It must be noted that the larceny section is very comprehensive. It has been held to cover at least four crimes: (a) common law larceny; (b) embezzlement; (c) larceny by false pretences; and (d) felonious *breach of trust.*[14] Under this statute it has been held that a trustee who diverts or misappropriates the trust *res* is guilty of larceny, although such an act was not larceny at common law.[15] Hence, if Foye was holding the bank account as trustee, within the meaning of the Statute, for Brown, it would follow that his misappropriation by drawing upon it and giving the

[13] United States *v.* Montgomery, *supra,* footnote 11, at p. 548.

[14] See Matter of Dempsey (1900) 32 Misc. 178, 65 N. Y. Supp. 722; People *v.* Miller (1902) 169 N. Y., 339, 62 N. E. 418; People *v.* Shears (1913) 158 App. Div., 577, 143 N. Y. Supp. 861. "But the Penal Code recognized that the moral guilt of the two offenses was the same and swept away the theory by which the courts had felt constrained to distinguish them in principle. By it larceny is so treated as to include not only that offense as defined at common law and by the revised statutes, but also embezzlement, obtaining property by false pretenses and felonious breach of trust." People *v.* Dunmar (1887) 106 N. Y., 502, 508, 13 N. E. 325.

[15] "Diversion of trust funds by a trustee for use of himself or another was not larceny at common law, that crime involving an initial trespass and trover. But at present such act is made grand or petit larceny, depending upon the amount of property diverted, by sec. 1302 of Penal Law." People *v.* Shears, *supra,* footnote 14 at p. 577. People *ex rel.* Zotti *v.* Flynn (1909) 135 App. Div., 276, 120 N. Y. Supp., 511; see People *v.* Dumar, *supra,* footnote 14; People *v.* Miller, *supra,* footnote 14.

money to the relator was statutory larceny. The relator would then be receiving the identical goods which had been stolen, and would, therefore, be guilty of receiving stolen goods.

It is well settled that "One who acquires property by fraud, misrepresentation, imposition, concealment, or under any other circumstances as render it inequitable for him to retain it, is in equity regarded as the trustee of the party who suffers by reason of the fraud or other wrong and who is equitably entitled to the property."[16] Although such a trust is a constructive trust and a mere fiction or creature of the courts, still, for all purposes, "the parties defrauded, or beneficially entitled have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of the trust."[17] Hence, it has been held that the owner of negotiable securities, which had been stolen and sold by the thief, might claim the *proceeds* in the hands of the felonious taker or of his assignee with notice and that, furthermore, this right continued and attached to any securities or property in which the proceeds were invested so long as they could be traced and identified.[18] From this it would follow that whatever Foye received from the felonious transaction he was bound in equity to return to Brown, the defrauded party, or, in other words, he was a constructive trustee for the money or its proceeds for the benefit of the latter. The fact that the original money was four times removed from the money which he actually received would make no difference. He must keep the proceeds as a constructive trustee. Therefore, when he gave the relator the $21,000, he was giving her money which in all conscience he was bound to keep as a trustee for Brown.

The question, however, is whether the statute was intended to include constructive trustees. There are several difficulties that arise in coming to such a conclusion. In the first place, suppose Foye, in the principal case, had taken the money from the bank and had purchased an automobile with it, and subsequently had traded the auto-

[16] 3 Pomeroy's Equity Jurisprudence (4th ed.) §§ 1044 *et seq.* Graham *v.* King (1893) 96 Ky. 339, 24 S. W. 430; Dorsey *v.* Wolcott (1898) 173 Ill. 539, 50 N. E. 1015; Donnelly *v.* Kees (1903) 141 Cal. 56, 74 Pac. 433, a case under a statute; Butterfield *v.* Nogales Copper Co. (1905) 9 Ariz. 212, 80 Pac. 345; Howard *v.* Brown (1906) 197 Mo. 36, 95 S. W. 191; McDonald *v.* Tyner (1907) 84 Ark. 189, 105 S. W. 74; Dime Savings Bank *v.* Fletcher (1909) 158 Mich. 162, 122 N. W. 540; Henderson *v.* Murray (1909) 108 Minn. 76, 121 N. W. 214; Tetlow *v.* Rust (1910) 227 Pa. 292, 76 Atl. 22; see Smith *v.* Smith (1907) 153 Ala. 504, 45 So. 168.

[17] 1 Perry, Trusts & Trustees § 166.

[18] "It would seem to be an anomaly in the law, if the owner who has been deprived of his property by larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it has been converted, than the one who, by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. The law in such a case will raise a trust *in invitum* out of the transaction, for the very purpose of subjecting the substituted property to the purposes of indemnity and recompense." Newton *v.* Porter (1877) 69 N. Y. 133, 139.

mobile for a horse, and later had exchanged the horse for a diamond ring; he would have committed larceny four times, since on each occasion he would be misappropriating property, which he held as constructive trustee. Hence, he could be convicted four times, although Brown, the owner, was deprived of but one chattel. The second objection to such a construction is that it would make the receiver of stolen goods subject to the crime of larceny in addition to the crime of receiving stolen goods. For example, when the relator received the money, she became constructive trustee, since she was not equitably entitled to it. Hence, when she expended it, or refused to give it up, she would be misappropriating it within the meaning of the statute and would thus be committing larceny. The third objection to such a construction of § 1290, is that § 1302, which is also part of the article of larceny, in dealing with misappropriation or conversion by trustees, specifically limits the word "trustee" to one "appointed by deed, will, or other instrument, or by an order or judgment of a court or officer." This section, therefore, would seem expressly to exclude a constructive trustee, but it is not conclusive.[19]

In view of these difficulties, it is probable that the legislature never intended to include constructive trustees within the meaning of the word "trustee" in § 1290. But it is undoubtedly highly desirable to subject the relator to punishment in order to place an obstacle in the way of future imitators of the plan followed in the principal case. A court, therefore, might be so desirous to convict the relator, that it would reach out beyond mere precedent and statutory provisions. It might then be convenient to say in support of such a result either one of two things. First, that the larceny statute includes constructive trustees. Secondly, the procuring of the money from the bank was the first tangible benefit of the claim which Foye secured by his larcenous transaction. The relator, therefore, in receiving part of this identical money may be said to have received stolen goods. In any event, whatever the result that may be reached by the New York Court of Appeals in passing on the case, the circumstances here presented show a situation for legislative regulation.

BASIS OF JURISDICTION FOR THE PROTECTION OF TRADE SECRETS.—If there is any policy of the law which is firmly established, it is that which protects those intangible yet valuable commercial assets which

[19] If this section were construed literally, it would not include a trust of personalty orally created, although such a trust would be absolutely valid. Gilman *v.* McArdle (1885) 99 N. Y. 451, 2 N. E. 464; Matter of Carpenter (1892) 131 N. Y. 86, 29 N. E. 1005; Bork *v.* Martin (1892) 132 N. Y. 280, 30 N. E. 584; see Day *v.* Roth (1858) 18 N. Y. 448; Britton *v.* Lorenz (1871) 45 N. Y. 51. Hence, in all such cases the trustee could wilfully misappropriate the trust property without being subject to criminal liabiity. It is submitted, however, that the trustee would not be permitted to escape punishment, and that, therefore, § 1302 would not be construed literally. If this hypothesis is true, then § 1302 might also be construed to include constructive trustees.